

STATE OF MICHIGAN
COURT OF APPEALS

ROY HOWE,

Plaintiff-Appellant,

v

WORLD STONE & TILE and ROB STRAKY,

Defendants-Appellees,

and

PAUL PANDALFO,

Defendant.

UNPUBLISHED

June 3, 2008

No. 275442

Oakland Circuit Court

LC No. 2006-073794-NZ

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants' motion for summary disposition. We affirm.

I. FACTS

This worker's compensation retaliatory discharge case arises out of an injury that plaintiff sustained while he was employed as a sawyer at World Stone & Tile (World Stone).¹ Plaintiff allegedly injured his shoulder and neck on the job in mid-December 2004, while lifting marble slabs. He did not file an accident report or seek medical treatment at the time of injury.² Plaintiff continued to work until January 11, 2005, when he sought medical treatment with World Stone's doctor for his injuries. World Stone's doctor placed plaintiff on "light duty" with

¹ Plaintiff assisted in cutting stone in World Stone's marble and granite fabrication business. World Stone originally hired plaintiff in October 2002. He was terminated in October 2003 for unprofessional behavior, but he was rehired in February 2004.

² Plaintiff filed accident reports on the two prior occasions he alleged to have been injured on the job.

the following restrictions: no lifting over 10 pounds and no reaching above shoulder level. Plaintiff was also prescribed 800mg Motrin.³ The same day, after receiving notification that plaintiff was on “light duty” restrictions, World Stone offered plaintiff an accommodation: instead of alternating between working with stone and operating a forklift (which is what plaintiff normally did), plaintiff would exclusively operate the forklift at his same rate of pay. The parties dispute what occurred next. Plaintiff asserts that he advised World Stone that he could not accept the accommodation because operating the forklift was dangerous and outside his restrictions⁴. Defendants contend that plaintiff never offered a reason why the accommodation was unacceptable. Plaintiff failed to report to work from Wednesday, January 12, 2005 to Friday, January 14, 2005. Robert Straky, co-owner of World Stone, wrote to plaintiff on January 14, 2005, advising that plaintiff would be terminated if he failed to report for work on Monday, January 17, 2005. Plaintiff maintains that he did not receive the letter, but he does not dispute that he knew that he would be fired if he did not report for work on January 17, 2005. Plaintiff did not report for work on January 17, 2005, and was subsequently terminated on January 18, 2005, when he attempted to report for work. On January 20, 2005, plaintiff filed an application for mediation or hearing with the Bureau of Workers’ and Unemployment Compensation Section in Lansing, Michigan.

Plaintiff filed suit on April 10, 2006, alleging worker’s compensation retaliatory discharge. Defendants moved for summary disposition on October 11, 2006, under MCR 2.116(C)(8) and (10), and a hearing was held on November 29, 2006. The trial court ruled from the bench, and entered an order the same day, granting defendants’ motion for summary disposition. The trial court first concluded that plaintiff’s request for medical treatment was not equivalent to a claim for benefits under MCL 418.310(11). The court then held that because plaintiff did not file a worker’s compensation petition before he was discharged, he could not establish a claim for retaliatory discharge under MCL 418.310(11).

Plaintiff moved for reconsideration on December 12, 2006. On December 20, 2006, the trial court denied that motion. Plaintiff now appeals.

II. STANDARD OF REVIEW

We review a trial court’s decision on a motion for summary disposition de novo. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). “A motion for summary disposition brought [under] MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone.” *Id.* A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition under (C)(10), this Court

³ World Stone contends that it had no notice that plaintiff was prescribed medication.

⁴ Plaintiff’s stated reasons for rejecting the accommodation: (1) the Motrin bottle indicated that the medicine should not be used when operating heavy equipment and (2) the physical restriction (no reaching) prevented plaintiff from operating the high-lo forklift safely.

must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party.⁵ *Id.*

III. ANALYSIS

Plaintiff argues that the trial court erred in dismissing his retaliatory discharge claim under § 301(11) of the Worker's Disability Compensation Act (WDCA), MCL 418.101, *et seq.* We disagree.

Employees have a cause of action in tort if they are discharged in retaliation for filing a worker's compensation claim. *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 245-249; 531 NW2d 144 (1995). Indeed, MCL 418.301(11) provides as follows:

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

To establish a retaliatory discharge claim under the WDCA, the plaintiff must prove that: (1) he asserted his right for worker's compensation, (2) he was discharged or his employment was otherwise adversely affected, (3) the defendant's stated reason for its action was pretext, and (4) the defendant's true reason for its action was in retaliation for the plaintiff having filed a worker's compensation claim. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 470; 606 NW2d 398 (1999). In other words, a plaintiff must show that his employer acted adversely in retaliation for his exercise of his rights under the WDCA, and that any legitimate reason for the action put forth by the employer was in fact merely a pretext for retaliation. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 817-818; 584 NW2d 589, vacated 230 Mich App 801 (1998), reasoning adopted by conflict panel 233 Mich App 560 (1999).

Plaintiff first argues that the trial court erred in concluding that the only way he could be protected under the WDCA, for purposes of his retaliatory discharge case, is by actually filing a petition with the worker's compensation bureau. More specifically, plaintiff argues that filing his worker's compensation petition after he was terminated is not fatal to his retaliatory discharge claim because he was protected under the act when he asserted a right afforded him by the WDCA—the right to medical care and treatment under MCL 418.315.⁶ Defendants, on the

⁵ While the trial court appears to have granted defendants' motion under MCR 2.116(C)(8), the motion was brought under both (C)(8) and (C)(10), and we use the (C)(10) standard to analyze the "pretext" portion of plaintiff's retaliatory discharge claim.

⁶ MCL 418.315(1) states, in pertinent part, as follows:

The employer shall furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other

(continued...)

other hand, assert that case law interpreting MCL 418.301(11) is clear that an employee must file his or her worker's compensation claim before being discharged. We believe that plaintiff's argument has merit.⁷ However, even if we assume that plaintiff was protected under the act, his claim still fails because he has not shown that his assertion of a right under the WDCA and his termination are causally connected. Further, defendants have articulated a legitimate, nonretaliatory reason for plaintiff's termination—his failure to report to work—and plaintiff has failed to show that this reason is mere pretext for retaliation.⁸

Again, the plaintiff bears the burden of showing that a causal connection existed between the protected activity and the adverse employment action. *Chiles, supra* at 470. In cases involving circumstantial evidence, a plaintiff must proceed under the burden-shifting approach articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003); *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Under this approach, the plaintiff must present a rebuttable prima facie case based on proofs from which a factfinder can infer that the plaintiff was subjected to unlawful retaliation. See *Sniecinski, supra* at 134. "Once a plaintiff has presented a prima facie case . . . , the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id.*; *Hazle, supra* at 464. If the defendant presents evidence to rebut the presumption, "the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Sniecinski, supra* at 134. Here, plaintiff presents nothing more than the temporal connection between his assertion of his right to medical care and his termination, and that is not sufficient to prove that the two events were

(...continued)

attendance or treatment recognized by the laws of this state as legal, when they are needed.

⁷ This Court has held that a plaintiff may not maintain a cause of action for retaliatory discharge based on the anticipated filing of a worker's compensation claim. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 668; 473 NW2d 790 (1991); *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638, 645-646; 413 NW2d 79 (1987). And subsequent panels of this Court have interpreted *Griffey* and *Wilson* to mean that a plaintiff who files a worker's compensation petition after he or she was terminated may not maintain a cause of action for retaliatory discharge under the WDCA. See *Wood v Huron Casting, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 239478); *Vettese v Jacobsob Stores, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2001 (Docket No. 222508). However, these cases appear to be at odds with the plain language of the WDCA. MCL 418.301(11) states that in addition to not retaliating against an employee for filing a worker's compensation claim, an employer may not retaliate against an employee for "exercising . . . a right afforded by [the WDCA]." Here, plaintiff asserted a right afforded by the act. He sought medical care and treatment, which he was entitled to under §315(1) of the WDCA. Therefore, it would appear that plaintiff was protected under the plain language of the WDCA.

⁸ The trial court did not reach this issue in granting summary disposition. However, that does not preclude review and determination by this Court because it was raised by defendant as an alternate ground for summary disposition and all of the necessary facts are before this Court on appeal. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005).

causally connected.⁹ *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). But even if plaintiff could show a causal connection, defendant offered a legitimate, nonretaliatory reason for plaintiff's termination—he failed to show up for work—and plaintiff has offered no evidence to show that the stated reason was mere pretext. *Sniecinski, supra* at 134. Indeed, plaintiff does not dispute that he did not show up for work on January 17, 2005, and he admitted that he knew that he would be fired if he did not show up. Further, the fact that plaintiff filed two prior worker's compensation claims without incident while employed with defendants supports the conclusion that defendants' decision to terminate was not to retaliate, but because plaintiff failed to show up for work. Therefore, although it did so for a different reason, we conclude that the trial court did not err in granting defendants' motion for summary disposition. And this Court will not reverse where the trial court reaches the right result for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette

⁹ Plaintiff refers this Court to the fact that defendants testified that they had no intention to terminate plaintiff before January 11, 2005 in conjunction with the timeline to support that the events are causally connected. Plaintiff also refers this Court to the following as evidence of defendants' displeasure with his work-related injury: he was disciplined on December 20, 2004 for not showing for an overtime shift he volunteered for; his follow-up visit with defendants' doctor and his insurance were both cancelled upon termination; and defendants tried to force him to illegally operate the forklift. However, we fail to see how any of these are evidence that defendants' articulated reason for termination (his failure to show up for work) is mere pretext for retaliation.